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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 814

ALF M. LANDON,
Petitioner,

vs.

NORTHERN NATURAL GAS COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Kansas, dated September 7, 1961 (App. C of Petition) is reported at 212 F. Supp. 856. The opinion of the Court of Appeals, dated October 22, 1964 (App. B of Petition) is reported at 338 F. 2d 17.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Does a state minimum price order which has been held to be void *ab initio* nevertheless impose on a buyer of natural gas a price increase above the price fixed by contract simply because a copy of the void order was deposited with the Federal Power Commission as a part of the seller's rate schedule filing under the Natural Gas Act?

STATEMENT

Prior to January 1, 1954, Petitioner, Alf M. Landon ("Landon"), and Respondent, Northern Natural Gas Company ("Northern"), entered into contracts for the sale and purchase of natural gas produced by Landon from the Hugoton Field in Kansas. The prices agreed upon were 4¢ and 5¢ per thousand cubic feet (Mcf), measured on a pressure base of 16.4 pounds per square inch absolute (psia). Each contract contained the following provision:

> "This contract is subject to all valid legislation with respect to the subject matter hereof, either State or Federal, and to all *valid* present and future orders, rules and regulations of duly constituted authorities having jurisdiction." (Emphasis supplied).

Effective January 1, 1954, the Kansas Corporation Commission purported to establish a minimum price of 11¢ per Mcf at 14.65 pounds psia for natural

gas taken from the Hugoton Field. With its first payment to Landon at the 11¢ level, Northern sent Landon a letter dated February 24, 1954 which stated that during the pendency of litigation attacking the validity of the 11¢ Order, Northern would, under duress of business compulsion, pay Landon at the 11¢ level, but that if the Order were ultimately declared invalid, Landon would refund to Northern the overpayments made under the Order. The check which accompanied said letter bore on the back thereof a condition of endorsement which said that it was endorsed and accepted by Landon subject to the conditions of the accompanying letter.

Landon, without objection, endorsed and accepted the check and all subsequent checks issued by Northern to Landon for gas purchased during the period of the supposed effectiveness of the 11¢ Order. Each check bore the notation that it was endorsed and accepted subject to the terms and conditions of the February 24, 1954 letter.

Meanwhile, on June 7, 1954, this Court held in *Phillips Petroleum Company v. Wisconsin*, 347 U. S. 672, that sales of natural gas such as those from Landon to Northern were subject to regulation by the Federal Power Commission. In compliance with a Federal Power Commission order requiring producers such as Landon to file with the Commission rate schedules consisting of the basic contract and all supplements and agreements amendatory thereof effective and applicable on or after June 7, 1954, Landon transmitted to the Commission his initial rate schedules which included

the 4¢ and 5¢ gas purchase contracts and copies of the 11¢ Order.

The Commission, by letters dated February 21, 1955 and March 9, 1955, accepted Landon's rate schedules for filing. Copies of such letters were not sent to Northern by the Commission,[1] nor did the Commission notify Northern of any Commission actions concerning any rate schedule filings by Landon. Both of said letters stated that Commission acceptance of the rate schedules for filing was not to be construed as constituting approval of any rate, and that Commission acceptance of the schedules for filing should not be deemed as recognition of any claimed contractual right or obligation associated therewith.

On January 20, 1958, this Court reversed the judgment of the Supreme Court of Kansas which had sustained the validity of the 11¢ Order. *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U. S. 391. On April 11, 1959, the Supreme Court of Kansas held that the effect of this Court's action was to render the 11¢ Order void *ab initio*. *Cities Services Gas Co. v. State Corporation Commission of Kansas*, 184 Kan. 540, 337 P. 2d 640, *cert. denied* 361 U. S. 836.

By letter dated July 31, 1958, Northern demanded that Landon refund $30,806.54, the difference between amounts paid under the 11¢ Order and the amounts payable under the 4¢ and 5¢ gas purchase contract prices. Landon refused to pay, and this action ensued.

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1 Landon's statement that the Commission sent copies of such letters to Northern (Petition, p. 5) does not comport with the Record (R. 100).

The United States District Court for the District of Kansas granted judgment for Northern on the common law refund contract theory of recovery set forth in the Complaint, holding that the rights and liabilities of the parties had been fixed by their contracts and that because of the total invalidity of the 11¢ Order, the proper rate should be found in those contracts as originally drawn. The Court of Appeals for the Tenth Circuit affirmed.

ARGUMENT

I.

There Is No Important Question of Federal Law

In allowing Northern to recover protested overpayments made under compulsion of the invalid Kansas 11¢ Order, the trial court and the Court of Appeals for the Tenth Circuit merely applied principles established by this Court, other circuit courts and the Federal Power Commission and enforced contracts filed with the Commission according to their terms.

The essence of Landon's first, second, third and fifth arguments for granting the writ is that the action of the Court of Appeals for the Tenth Circuit permitting Northern to recover the amount due under its refund contract with Landon constituted an invasion of the exclusive jurisdiction of the Federal Power Commission initially to hear and decide questions involving the effectiveness of rate schedules on file with the Commission.

That the United States District Court for the District of Kansas had jurisdiction to hear and decide the

common law contract and restitution claims advanced by Northern and the defenses of Landon thereto was settled by this Court in *Pan American Petroleum Corporation v. Superior Court of the State of Delaware for New Castle County*, 366 U. S. 656 (1961).

There, on facts substantially identical to those present here, this Court observed that contract and restitution claims advanced by a natural gas buyer seeking to recoup monies paid under compulsion of the void Kansas 11¢ Order were claims of right arising under state, not federal law. In disposing of the seller's argument that the claims were really challenges to the rate schedules of the seller on file with the Federal Power Commission and, therefore, under Section 19 of the Natural Gas Act (Petition, pp. 2A-4A), cognizable only before the Commission itself, this Court held that the traditional common law contract and restitution claims asserted by the buyer did not lose their character when and if the seller raised a defense based on the Natural Gas Act. Then, after holding that initial resort to the Federal Power Commission was not essential to maintain uniformity in the determinations of the effectiveness of filed rate schedules, this Court concluded:

> "We hold that the state courts of Delaware do have jurisdiction to hear and decide the claims that Cities Service has formulated." 366 U. S. 656, 666.

The Federal Power Commission recognized three years ago that the decision in *Pan American Petroleum Corporation* had answered affirmatively the natural gas industry question whether state courts and federal

courts having jurisdiction by reason of diversity could determine in common law contract actions the effectiveness or ineffectiveness of void state minimum price orders filed with the Commission. By an order dated March 14, 1962 (27 Fed. Reg. 2657, March 21, 1962) the Commission amended its earlier order which terminated proposed rulemaking proceedings contemplating the rejection of state minimum price orders tendered for filing. The amending order says in pertinent part:

> "We recognize, moreover, that a buyer of natural gas who has paid seller on the basis of a state minimum price law can invoke the jurisdiction of an appropriate court in the event that his contract provides for a refund if the state minimum price laws are held invalid." [Citing *Pan American Petroleum Corp. v. Superior Court of Delaware for New Castle County,* 366 U. S. 656 (1961)].

Therefore, because this Court has already decided adversely to him the matter raised by Landon, the granting of the petition for certiorari herein would not lead to the resolution of any question of general consequence.

II.

There Is No Conflict of Decision

As his fourth reason for granting the writ, Landon asserts that there is an intra-circuit conflict between this case and *Cities Service Gas Company v. Federal Power Commission,* 255 F. 2d 860 (1958). That case was a direct appeal, under Section 19 (b) of the Natural Gas Act, from a Commission order which modified

an earlier order by deleting therefrom the proviso that Commission acceptance for filing of a copy of the Kansas 11¢ Order was without prejudice to any claims which had been made by the buyer of natural gas in then-pending litigation to recoup overpayments made under the compulsion of the 11¢ Order. The Court of Appeals for the Tenth Circuit set aside the order of the Commission accepting the 11¢ Order and directed the Commission to strike the 11¢ Order from its files.

That decision is wholly consistent with its later decision in the instant case. The result in both cases was a determination that Commission acceptance for filing of a copy of the void 11¢ Order was ineffective to modify the contract prices. The only difference is that in the one case the determination came on a direct appeal from a Commission order in administrative proceedings in which both the buyer and seller were parties; and in this case the determination came in a common law contract action in which the effect of Commission acceptance of copies of the 11¢ Order (in proceedings of which the gas buyer had no notice and to which it was not a party) was first raised by way of a defense. The jurisdiction of the Court of Appeals for the Tenth Circuit to decide both cases was clearly established by the decision of this Court in *Pan American Petroleum Corporation.*

In all of the actions which pipeline companies have brought to recover overpayments made under void state minimum price orders, the producers have asserted that such orders, although invalid, were effective to increase their rates because copies of the orders were

filed with the Federal Power Commission as a part of the producers' rate schedules. Without exception, the courts, both state and federal, have in each instance rejected the argument, and in each instance that an attempt was made to seek review by this Court, this Court refused to grant the request.

Typical of these uniform decisions is *Pan American Petroleum Corporation v. Kansas-Nebraska Natural Gas Company*, 297 F. 2d 561 (8th Cir., 1962), *cert. denied* 370 U. S. 937 (1962). The Court of Appeals for the Eighth Circuit held:

> "When the Supreme Court of the United States in Cities Service Gas Co. v. State Corporation Commission of Kansas, 1958, 355 U. S. 391, 78 S. Ct. 381, 2 L. Ed. 2d 355, held the Kansas 11¢ Order unlawful and the Supreme Court of Kansas, in Cities Service Gas Co. v. State Corporation Commission of Kansas, 1959, 184 Kan. 540, 337 P. 2d 640, certiorari denied 361 U. S. 836, 80 S. Ct. 89, 4 L. Ed. 2d 77, held in accordance with such decision that the Kansas 11¢ order was void *ab initio*, the effect was that the order became a complete nullity. Being a nullity, it could not modify the contract rates between the parties. The effect could only have been to leave the parties where they were prior to the unlawful order—in other words, bound by the contract rates to which they had agreed in 1949, 1950 and 1952." 297 F. 2d 561, 568.

The language is almost verbatim the language of the Court of Appeals for the Third Circuit in *Natural Gas Pipeline Company of America v. Federal Power*

Commission, 253 F. 2d 3, 7 (1958), *cert. denied sub nom. Dorchester Corp. v. Natural Gas Pipeline Company,* 357 U. S. 927 (1958), and of the Court of Appeals for the Tenth Circuit in *Cities Service Gas Company v. Federal Power Commission,* 255 F. 2d 860, 865 (1958), *cert. denied sub nom. Magnolia Petroleum Company v. Cities Service Gas Company,* 358 U. S. 837 (1958). Cf. *Natural Gas Pipeline Company of America v. Harrington,* 246 F. 2d 915 (5th Cir., 1957), *cert. denied* 356 U. S. 957 (1958), and *Cities Service Gas Company v. United Producing Company,* 212 F. Supp. 116 (U. S. D. C., N. D. Okla., 1960).

It is respectfully submitted that there is no occasion for this Court to review on certiorari the decision of the Court of Appeals for the Tenth Circuit which is in accord with and supported by every adjudication of every court which has passed upon the question.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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